



The relief described hereinbelow is SO ORDERED.

Signed August 25, 2009.

A handwritten signature in cursive script that reads "Robert D. Berger".

ROBERT D. BERGER
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**JEFFREY V. VOLKERDING and
SHERRI L. VOLKERDING,
Debtors.**

**Case No. 03-25058
Chapter 7**

**PERRY DEVELOPERS, INC.,
Plaintiff,**

v.

Adv. No. 04-6062

**JEFFREY VOLKERDING,
Defendant.**

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Plaintiff Perry Developers, Inc. ("Perry"), filed this action under 11 U.S.C. §523 seeking to except from discharge in excess of \$308,000.00 arising from a state court judgment finding Debtor obtained funds through fraud. Debtor moves the Court to dismiss Perry's §523 complaint because it was filed after the March 8, 2004, deadline. The Court grants Debtor's motion.

Background

Debtor filed for bankruptcy on December 1, 2003. The Court set March 8, 2004, as the deadline for filing complaints objecting to discharge and determining the dischargeability of certain debts. Perry filed its complaint on April 7, 2004. Perry did not file any motions for an extension of time.

On May 26, 2004, Debtor filed an answer, but did not specifically raise the time limitation found in Rule 4007(c) as an affirmative defense. In the Answer, Debtor raised “latches [sic], waiver, lack of jurisdiction, and any other matter that constitutes an affirmative defense or avoidance that may be discovered during the pendency of this action.” On October 29, 2004, Debtor filed his first motion to dismiss. The Court denied the first motion without prejudice stating,

[I]n *Kontrick v. Ryan*, the United States Supreme Court agreed with the Seventh Circuit Court of Appeal’s observation that time bars, such as the time constraints of Rules 4004(a) and (b) of the Federal Rules of Bankruptcy Procedure, which provide essentially the same time prescriptions as Rule 4007(c), must be raised in an answer or responsive pleading.¹ Mr. Volkerding did not raise the time constraints prescribed by Rule 4007(c) by answer or responsive pleading. Consequently, Mr. Volkerding’s Motion to Dismiss must be denied.²

The Court notes, however, that “leave [to amend an answer] shall be freely given when justice so requires.”³ Because Mr. Volkerding filed his Motion to Dismiss early in this proceeding and both he *and* Perry should have been aware of the time bar prescribed by Rule 4007(c), allowing Mr. Volkerding to amend his Answer will not unduly prejudice Perry. The Court therefore grants Mr. Volkerding leave to file an Amended Answer

¹ *Kontrick v. Ryan*, 540 U.S. 443, 459 (2004) (citing Fed. R. Civ. P. 8(c) and agreeing with the 7th Circuit Court of Appeals that time bars generally must be raised in an answer or responsive pleading).

² Although the statute of limitations is an affirmative defense, it may be raised as a Fed. R. Civ. P. 12(b)(6) motion for failure to state a claim when the critical dates alleged in the complaint plainly show the limitations period to have expired. See *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980). Here, the complaint does not plainly show the limitations period to have expired. Accordingly, the time bar prescribed by Rule 4007(c) is not properly raised in Mr. Volkerding’s Motion to Dismiss.

³ FED. R. CIV. P. 15(a), made applicable to this proceeding by FED. R. BANKR. P. 7015.

Debtor filed his First Amended Answer in the time allowed by the Court and cited Rule 4007(c). Thereafter, Debtor filed his second motion to dismiss. Then, for over two years, the case languished after the parties advised the Court they were attempting to settle. In May 2009, the Court summoned the parties to a status conference and advised counsel it would take the second motion to dismiss under advisement.

Discussion

A §523 complaint to determine the dischargeability of a particular debt must be filed not later than 60 days following the first date set for the meeting of creditors.⁴ Rule 4007(c) reflects an important policy and purpose to protect debtors from continued creditor demands after a date certain. A definitive end to creditor collection attempts facilitates the debtor's prompt emergence from bankruptcy and advances bankruptcy's preeminent goal, the debtor's fresh start. Accordingly, the time limit for §523 actions is to be strictly enforced.⁵

A debtor forfeits the timeliness defense if he proceeds to trial on the merits without raising it.⁶ In *Kontrick*, a creditor filed an objection to a debtor's discharge out of time. The debtor answered the complaint and responded to a summary judgment motion without raising the timeliness defense. Only after the bankruptcy court granted the creditor summary judgment did the debtor move for reconsideration, arguing the complaint was not timely filed. The Supreme Court held the timeliness defense is lost if the debtor does not raise the issue before the court reaches the merits of the complaint.⁷ *Kontrick* noted the proper place and time to raise timeliness

⁴ FED. R. BANKR. P. 4007(c).

⁵ *In re Atteberry*, 194 B.R. 521, 523 (D. Kan. 1996), citing *In re Themy*, 6 F.3d 688, 689 (10th Cir. 1993).

⁶ *Kontrick v. Ryan*, 540 U.S. 443, 459 (2004).

⁷ *Id.*

is in the answer or responsive pleading; however, *Kontrick* also noted an answer may be amended to include an inadvertently omitted affirmative defense even after the time to amend “as a matter of course” has passed.⁸

Debtor’s first motion to dismiss was denied without prejudice for the stated purpose of allowing an amended answer to raise the timeliness defense. A legal defense to a claim not raised in a pre-answer motion to dismiss may be raised in an amended pleading, a motion for judgment on the pleadings or summary judgment except for the defenses specifically mentioned in Fed. R. Civ. P. 12(h)(1).⁹ Timeliness is not a defense mentioned in Fed. R. Civ. P. 12(h)(1); thus, it is a legal defense capable of being raised by amendment or other method listed in Fed. R. Civ. P. 12(h)(2).¹⁰

Despite the passage of time spent on a possible settlement, Debtor raised a Rule 4007(c) defense prior to the Court reaching the case on the merits. Further, Debtor raised the defense according to leave previously granted by the Court. Perry’s §523 complaint was untimely filed without leave for an extension. Rules 4007 and 9006 are unforgiving to Perry, while Debtor, under Rules 7012(h)(2) and 7015, has until the Court renders judgment on the merits of the case to raise timeliness as a defense.

Conclusion

IT IS ORDERED Debtor’s Motion to Dismiss the Complaint is GRANTED.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE

⁸ *Id.*

⁹ FED. R. CIV. P. 12(h)(2).

¹⁰ *See Roderick v. Roderick (In re Roderick)*, 126 B.R. 280, 283 (Bankr. N.D. Okla. 1991).

DISTRICT OF KANSAS